

Supreme Court of the Hawaiian Islands.—In Banco. April Term, 1887.

THE KING VS. YOUNG TANG.

BEFORE JUDGE C. J. McLELLY, J., PRESTON J., HICKSON J., FORANDELL J., JUSTICES.

Opinion of the Court.

This case comes to us on an appeal on points of law from the Police Court of Honolulu. The defendant was charged with the offense of having opium unlawfully in his possession. He pleaded not guilty and the evidence on the part of the prosecution was taken and the Crown rested. The defendant then, by his attorney Mr. J. T. Dare, moved that the defendant be discharged on the grounds:

"First: The Crown has not proven its charge of unlawful possession of opium."

"Second: That the possession of opium under the law of 1886 is not a crime."

"Third: That the Act of 1886, entitled 'An Act to regulate the importation and sale of opium in this Kingdom,' is unconstitutional and therefore void and of no effect."

The Police Justice overruled the motion, and the defendant offering no testimony in defense, the Police Justice found him guilty and sentenced him to pay a fine of one thousand dollars and to be imprisoned at hard labor for the term of two years.

Whereupon the defendant gave notice of and thereafter perfected an appeal to the Supreme Court in Banco upon the above points of law made on his motion to be discharged.

This being an appeal solely upon points of law, the Court has not only to determine whether the appellant is liable to any punishment under the statute of last session, but whether there is any other law in force which subjects the appellant to punishment, because if we should so find, we must remit the case to the Police Magistrate in order that a legal sentence may be passed.

We must therefore ascertain how far the said statute conflicts with the law as it stood when such statute came into operation.

For this purpose it will not be necessary to go back further than the law of 1874.

The title of this Act as amended by the Legislature of 1876 is "An Act to restrict the importation and sale of opium or preparations thereof."

This Act was amended in several particulars immaterial to be considered in this case, except an Act being Chapter XXV of the laws of 1880 which will hereafter be more particularly referred to.

The Act of 1874 is as follows:

Section 1. The importation of opium or any preparation thereof into this Kingdom, except as authorized by Section 2 of this Act is hereby strictly prohibited; and whosoever shall import, sell, give or furnish opium or any preparation thereof to any person in this Kingdom, except as provided in said Section 2 shall be liable to a penalty of not less than one hundred dollars, and to be imprisoned at hard labor for any term not exceeding two years, one half of which pecuniary penalty shall be paid to the party giving the information which shall lead to the conviction of the offender.

Section 2. The Board of Health may from time to time, import such quantities of opium or preparations thereof as the said Board shall deem necessary for medical purposes in this Kingdom and shall furnish it at cost to any physician or surgeon having a diploma or certificate from some medical college or university and who has a license to practice medicine in this Kingdom, also to the person in charge of the medicines at the Leper Settlement at Molokai to be used exclusively for medical purposes. And the said Board may also furnish it to the captain or surgeon of any vessel bound to a foreign port for use on board said vessel.

Section 3. Any person who shall have in his possession opium or any preparation thereof which he shall not have received from the Board of Health or from a duly licensed physician or surgeon as prescribed in Section 2 of this Act, shall forfeit such opium or preparation thereof to the Hawaiian Government, and the same shall be seized and delivered to the Board of Health and such person shall be imprisoned for a term of not more than one year with or without hard labor in the discretion of the Court.

(By Chapter XVIII of the session laws of 1880 the punishment was increased to a penalty of not less than \$50 nor more than \$250 and imprisonment not exceeding one year.)

Section 4. Any physician or surgeon who shall sell, prescribe or furnish opium or any preparation thereof to any person in the habit of smoking or otherwise using the same or to any other person except as a remedy in case of sickness shall forfeit to the Hawaiian Government all opium or preparations thereof which may be in his possession, and it shall be seized and delivered to the Board of Health, and he shall be fined in the sum of not less than twenty-five nor more than one hundred dollars, and if he shall violate this Act more than once he shall not again be furnished with opium by the Board of Health.

Section 5. Nothing in this Act shall be construed to exempt any person or vessel from the pains and penalties prescribed by the laws of the Kingdom against smuggling.

At the session of the Legislature held in 1880 the following law was passed:

"An Act to authorize the Minister of the Interior to grant licenses for the sale of poisonous drugs."

Section 1. The Minister of the Interior may grant a license to any duly qualified physician or surgeon or to any other suitable person who may be recommended by the Board of Health to import and sell poisonous drugs for the term of one year in the district of

Honolulu upon receiving the sum of forty dollars, and in any other district the sum of twenty dollars.

Section 2. No such license shall authorize the licensee to import, sell or furnish opium or any preparation thereof except on the prescription of a duly qualified physician.

Section 3. The Board of Health by its president may authorize any duly qualified physician or surgeon or any licensee under this Act to enter opium and preparations thereof at the Custom House on the payment of the duties thereon, anything in the Act approved on the 8th of August 1874 entitled 'An Act to restrict the importation and sale of opium and preparations thereof,' to the contrary notwithstanding.

Section 6. Any person who shall import, sell or furnish any poisonous drug without license, or contrary to the provisions of this Act shall be fined not less than fifty nor more than five hundred dollars or to be imprisoned at hard labor not exceeding six months in the discretion of the Court. Nothing in this Act contained shall be construed to prevent the Government or the Board of Health from importing any drugs or medicines.

Section 6. The provisions of Chapter LXXXVIII of the Penal Code shall apply to all persons holding licenses under this Act."

Chapter LXXXVIII of the Penal Code referred to in the last mentioned Act regulates the sale of deadly poisons and prescribes the manner in which records shall be kept by persons selling the same, and Section 4 enacts that:

"Every licensed physician, druggist or apothecary who shall compound, sell or deliver any prescription containing any poisonous drug or substance deleterious to human life, to be used as medicine, shall enter upon his books said prescription written out in full with the date thereof, with his own name appended thereto, or the name of the physician who prescribed the same and the person to whom the same was delivered; and no such prescription shall be compounded, sold or delivered unless the name of the person compounding, selling or delivering the same, or the name of the physician prescribing the same be appended to the prescription in full, and every such prescription shall be preserved; and said books and prescriptions shall be subject at all times to the Minister of the Interior or his agent."

5. Any person violating the provisions of this chapter shall forfeit a sum not exceeding one thousand dollars for each offense.

In the session of 1880 another Act was passed relating to Chinese physicians, who were thereby allowed to receive licenses to practice medicine, "subject to the same laws and restrictions as other licensed physicians."

It would seem that the effect of the law, Chapter XXV of 1880, was to remove some of the restrictions of the law of 1874, and allowed licenses to be issued to persons outside the physicians mentioned in that law to sell poisonous drugs, and sell and furnish opium or its preparations to persons having prescriptions from any duly qualified physician.

And it would also seem that all persons dealing in poisonous drugs, of which there can be no doubt opium is one, were compelled to keep records of sales, etc.

And that no physician or surgeon could sell or prescribe or furnish opium or preparations to any person "in the habit of smoking or otherwise using the same."

And also that in consideration of the license fee the persons licensed could send for opium themselves, and the Board of Health were relieved from the necessity of importing it.

We now come to the law of 1886, entitled "An Act to regulate the importation and sale of opium in this Kingdom."

This Act repeals all laws and parts of laws inconsistent with it.

Its provisions are as follows:

Section 1. The Minister of the Interior is hereby authorized, with the consent of His Majesty the King in Cabinet Council, to grant to some one applying therefor a license to import and sell opium or any preparation of opium in this Kingdom upon the said Minister of the Interior receiving for such license the sum of thirty thousand dollars for each year.

Section 2. Before the license provided for in this Act is issued the person or persons who have obtained the same shall make and execute and deliver to the Minister of the Interior a good and sufficient bond in the sum of ten thousand dollars, with not less than one good surety, to be approved by the said Minister, conditioned that the party or parties who have obtained the license will not sell, give or furnish any opium or preparation of opium to any native Hawaiian, or Japanese, or to any other person who has not received a certificate from some physician stating that opium is the proper remedy for the disease from which the bearer is suffering, and that the rules and regulations contained in the license will not be violated.

Section 3. The person receiving such license shall keep in a book of record, to be furnished by the Minister of the Interior, a record of the names of all persons to whom such licensee has sold any opium, with the date of such sale and the quantity sold, and the name of the physician issuing the certificate on which sale is made, and the date of such certificate. Such record book shall be kept in the English and Hawaiian languages, and shall be open to inspection at any time to any member of the police force and the Minister of the Interior. The person holding the license shall give to each person purchasing opium a receipt stating the date of such

purchase and the quantity of opium sold.

Section 4. Every person not having a license who shall have possession of any opium contrary to the provisions of Sec. 3 of this Act, or who shall sell or furnish any opium or preparation of opium to any person or persons contrary to law shall, upon conviction thereof, be fined in a sum not less than one thousand dollars nor more than five thousand dollars, and be imprisoned at hard labor for any term not more than ten years nor less than two years.

Section 5. The person who has obtained a license under this Act is hereby authorized to import opium or preparation of opium through the Custom House, paying a duty upon the same of fifteen per cent. *ad valorem*, and there shall be charged on each container of opium at the rate of one dollar for each half pound of opium imported for a stamp to be put on each tin of opium imported. All opium seized which has been brought into this Kingdom without paying duty, and all opium which has not been stamped, shall be forfeited to the Government, and shall be stamped with the Government stamp. The Government may dispose of such opium to the party who has received the license upon his paying the duty upon the same of fifteen per cent. *ad valorem*, and one dollar per tin for the stamp.

Section 6. The person who has obtained a license who shall violate any of the provisions of this Act shall have his license cancelled, and the penalty of the bond provided for in this Act enforced, and be imprisoned at hard labor for a term not more than ten years nor less than two years, and pay a fine of not more than five thousand dollars nor less than one thousand dollars.

Section 7. In addition to the license prescribed by Sec. 2 of this Act, it shall be incumbent upon any person or persons desiring to purchase or use opium or any preparation thereof that they obtain a license from the Marshal or his deputy as hereinafter provided, authorizing the intending purchaser to use opium or any preparation thereof.

Section 8. The Minister of the Interior shall have authority to make rules and regulations for the proper regulation of the sale of opium or its preparations under this Act, and such rules and regulations, after being duly published, shall have the force and effect of law, and upon any violation thereof the party or parties so violating the same shall be subject to the penalties provided in Section 6 of this Act for four years, which shall be the length of time for which such license shall be granted, and it shall be so stated in the license.

Section 9. Jurisdiction is hereby conferred upon Police and District Magistrates to hear and determine all cases which may arise under this Act.

Section 10. One-half of the money penalties provided for by this Act shall be paid to the party who gave the information which led to the conviction of the offender fined.

Section 11. All laws and parts of laws in conflict with the provisions of this Act shall be and the same are hereby repealed; provided, however, that should no license be issued under the provisions of this Act, that then and in such case this Act shall not be deemed to, nor shall it repeal Chapter 56 of the laws of 1874, as amended by Chapter 63 of the laws of 1876 and Chapter 18 of the laws of 1880.

It would seem that the effect of this Act is to remove many of the restrictions relating to the importation and sale of opium and its preparations existing at the time the law was enacted.

One other person in addition to those persons authorized under the then existing law, was authorized on obtaining a license to import and sell opium and its preparations for the term of four years upon paying the license fee mentioned in the Act.

And although it may be urged that "where an act of parliament gives authority to 'one' person expressly, all others are excluded," the principle is carried out by holding that the authority to import and sell opium, etc., under this Act is exclusive to the licensee, and this construction will not be in conflict with the preceding laws on the subject, and, in fact, this statute merely enables one other person to deal in this poisonous drug.

And this view is further confirmed by Section 2, which provides for a bond conditioned that the licensee will not sell, etc., to "any person who has not received a certificate (which may mean prescription) from some physician, stating "that opium is the proper remedy for the disease from which the bearer is suffering."

There being no express enactment avoiding Section 4 of the Act of 1874, there is nothing in this Act in conflict with that section, and it therefore follows that physicians and persons licensed under the law of 1880 are controlled by that section, and may not prescribe to persons in the habit of smoking or using opium, etc.

As further illustrating this view we will consider Section 3 and compare it with Chapter LXXXVIII of the Penal Code.

This section provides that the licensee shall keep a record of sales, etc., in which he is to enter the names of all persons to whom he has sold opium, the date and quantity, the name of the physician issuing the certificate (prescription), and its date, and the licensee is to give the purchaser a receipt, etc.

This record is to be kept by the licensee under this Act instead of the one prescribed in the said chapter, the provisions of which are (in this respect only) in conflict with this law.

Section 4 prescribes a punishment of a fine of not less than one thousand nor more than five thousand dollars and imprisonment at hard labor for

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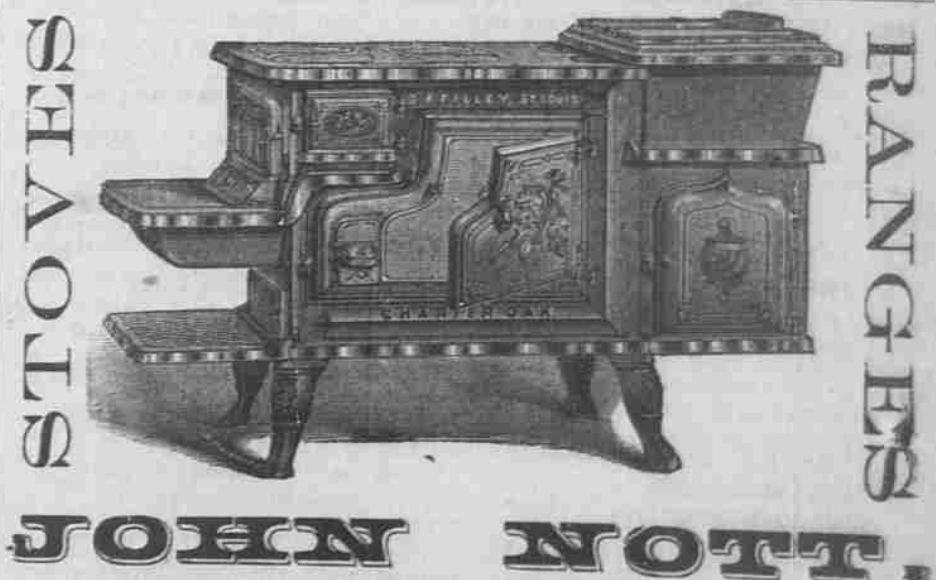
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